Supreme Court, U.S.
FILED
AUG 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1613

In the

United States Supreme Court

October Term, 1984

ROLAND G. HUEBNER, WILLIAM HUEBNER, and PETENWELL POTATO FARMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

Reply to Respondent's Opposition to Petition for Writ of Certiorari

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The petition for writ of certiorari by the petitioners ("Huebners") presents the critical issue of the application of the Section 404 agricultural exemptions to an ongoing farming operation.

This case involves the Huebners' expansion of an existing 57-acre cranberry bed by 10 acres (5 acres of which constituted "wetlands" under the Act), their maintenance of existing ditches, and their construction of additional ditches to store water and irrigate their cranberry bed and the 1,400 acres they crop on Bear Bluff Farms.

The land constituting Bear Bluff Farms has been dedicated to agricultural uses since the early 1900's. Agricultural ditches were initially dug on this land in 1908 and expanded in 1917. Since at least the 1930's, the ditches and the bulkheads in the ditches were operated for the same agricultural purposes for which they have been operated by the Huebners since they acquired the land in 1977. Farming methods have changed over the years, and the specific nature of farming on Bear Bluff Farms has also periodically changed. However, the dedication of this land to agricultural uses since the early 1900's remains the same.

The record establishes that the Huebners have carried out their farming activities no differently from other farmers similarly situated. They grow crops and cranberries on their land, utilize ditches with bulkheads and dams to store and convey water for irrigation purposes, maintain farm roads, and perform essential activities to maintain an effective farming operation. The Huebners have maintained, altered and expanded these improvements as necessary to modernize their farming operation and conduct an economically viable operation.

By enacting the 1977 Amendments to the Clean Water Act, particularly Section 404(f), Congress specifically exempted certain agricultural activities from the Section 404 permit program administered by the U.S. Army Corps of Engineers ("Government"). This proceeding presents the important issue of how these agricultural exemptions should be applied to certain farming activities which are common to a substantial portion of the agricultural community of this nation. The interpretation of these agricultural exemptions by the courts

below in this proceeding seriously emasculates the exemptions and defeats their intended purpose.

The Government erroneously and incorrectly attempts to liken the Huebners' activities to draining "thousands of acres of wetlands." (Government's Opposition to Petition, p. 7). The Government inaccurately asserts that Bear Bluff Farms is "comprised mostly of wet sedge meadows and shrub swamps" (Government's Opposition to Petition, p. 1), and inappropriately infers an effect of the Huebners' activities upon the Necedah National Wildlife Refuge and Wisconsin's Meadow Valley Wildlife Area.[1]

The Government also erroneously asserts that the Huebners' ditching activity was for the purpose of draining their land. To support this contention, the Government cites the testimony of the Government's expert, Richard Knitter, in claiming that a 30′ x 60′ x 15′ ditch constituted a drainage ditch. (Government's Opposition to Petition, p. 5) The Government neglects to cite Mr. Knitter's testimony in which he identified this ditch as a "true irrigation ditch . . . adjacent to the [cranberry] marsh where [the Huebners] have sufficient volume to pump from the ditch to flood their beds or for sprinklers." (Transcript, 4/19/83, pp. 286-87)

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[1] The district court's reference to wet sedge meadows and shrub swamps (Huebners' Petition, p. C-2) was miscited by the Government. The reference is not to the Huebners' property, but rather to the large geographical area known as Glacial Lake, Wisconsin, which covers much of south-central Wisconsin. The trial record contains no evidence of any effect of the Huebners' activities upon the Necedah National Wildlife Refuge. The only testimony concerning the Meadow Valley Wildlife Area was by the Government's expert, Richard Knitter, an employee of the Wisconsin Department of Natural Resources, who observed no effect of the Huebner's activity on the Wildlife Area. (Transcript, 4/18/83, p. 213)

The central dispute in this proceeding centers on how the agricultural exemptions set forth in Section 404(f) apply to the Huebners' activities. The Huebners fully contest the decisions below in this respect. It is true, as stated by the Government, that the Huebners do not challenge in this petition the lower courts' determinations concerning a violation of the stipulated consent order as it pertained to maintenance of the reservoirs; nor do the Huebners challenge the restoration ordered below. Nevertheless, a favorable determination by this Court would substantially impact these aspects of the dispute between the Huebners and the Government. A favorable decision would undermine the Government's claimed authority to control use of the agricultural reservoirs under Section 404; this is what constituted the underlying basis for including the reservoir provision in the stipulated consent order.

This petition raises a substantial and important controversy. It raises the issue central to the dispute in the proceedings below. Contrary to the Government's assertion (Government's Opposition to Petition, p. 4), review by this Court will directly affect the reservoir and restoration aspects of the dispute.

The legal issue is not to what extent a farmer can impact wetlands on his property. Rather, the issue is whether certain agricultural activities which result in placing dredged material into a wetland require a Section 404 permit or whether they are exempt under Section 404(f). Because the Huebners' farming activities are not unique but common to a substantial portion of the agricultural community, the precedence established by the decisions below seriously impacts the agricultural community. Other family farmers like the Huebners should not be similarly exposed to the devastating economic impact of either challenging the Government, as have the Huebners, or acquiescing in the Government's assertion of authority over their normal farming operations through the Section 404 permit requirement. It is in the public interest that this Court at this time clarify basic aspects of the interpretation and application of the agricultural exemptions set forth in Section 404(f) of the 1977 Amendments to the Clean Water Act to normal farming activities such as those carried on by the Huebners.

Dated this 23rd day of August, 1985.

Respectfully submitted,

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